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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1966**

**No. 77**

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LAWRENCE LONG,

*Petitioner,*

*—vs.—*

THE DISTRICT COURT OF IOWA, IN AND FOR LEE COUNTY, FORT MADISON, IOWA.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

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## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

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### ARGUMENT

**A. Conditioning Habeas Corpus Rights on Ability to Pay Deprives Indigent Prisoners of Equal Protection of the Law.**

The indigent prisoner is denied equal protection of the law when financial hurdles are discriminately interposed to condition the exercise of habeas corpus rights. This is exactly what has occurred in the case at bar. By requiring the petitioner to buy a transcript if he desires meaningful appeal, which purchase petitioner lacks funds to make, he is effectively foreclosed from full appellate review in habeas corpus. *Lane* v. *Brown*, 372 U.S. 477 and *Smith* v.

*Bennett,* 365 U.S. 708, specifically prohibit the imposition of hurdles based upon capacity to pay which impair the indigent prisoner's ability to exercise rights accorded petitioners with financial means.

Discrimination based upon poverty exists in the instant case where the kind of appeal a man enjoys depends upon the amount of money he has. Petitioners with means can obtain a hearing transcript and receive full appellate review of their habeas corpus trial. This is denied petitioner.

The need for a transcript to obtain full appellate review was recognized by the state legislature which established a statutory right to a trial transcript in criminal causes in Iowa. Section 793.8, Iowa Code (1962). The Supreme Court of Iowa has stated that the furnishing of a transcript is required to afford the indigent defendant an adequate appeal from his conviction. *Weaver* v. *Herrick,* 140 N.W. 2d 178, 181 (Iowa 1966). The court did not suggest that alternates or substitutes for a transcript existed under Iowa procedure to assure indigents the same appeal rights as defendants with means. Instead, the court announced that a stenographic transcript is called for to provide full appellate review in Iowa.

Notwithstanding this reasoning, the respondent suggests that alternatives to a stenographic transcript are available to the petitioner. While none of respondent's suggestions afford petitioner the means to present an adequate appeal record, they will be dealt with specifically.

**B. The Equal Protection Mandate Requires That Indigents Be Accorded Effective Appellate Review Where It Is Extended as of Right to Others.**

The respondent agrees that a state is constitutionally required to afford adequate appellate review to indigent habeas corpus applicants where such review is open to others (R. brief 10). Nonindigent petitioners can appeal and obtain meaningful review with the assistance of a stenographic transcript in Iowa. In this connection, respondent concedes that a hearing transcript would be helpful in habeas corpus appeals, but suggests in essence that the petitioner should be required to piece an appeal record together from other sources (R. brief 12). This suggestion does not meet the equal protection mandate.

The respondent suggests that a petitioner without a transcript is in a position to prepare a manuscript of the evidence, presumably from petitioner's recollection (R. brief 15). The decision of this Court in *Hardy* v. *United States,* 375 U.S. 277, points out that recollections and notes, even of trained counsel, are insufficient materials from which to prepare an effective appellate record. Requiring preparation from memory by the layman petitioner in the instant case would be incompatible with principles of fairness and equality.

One of the purposes of providing official court reporters was to preserve a full and accurate record of trial proceedings. *Tate* v. *U.S.,* 359 F.2d 245, 255. As stated in *Hendrix* v. *Rhay,* 56 Wash.2d 420, 424, 353 P.2d 878, 880 (1960):

> To expect and to require this petitioner to be able to recite errors occurring at his trial is to treat him with less than that degree of fairness demanded by the con-

> cept of due process and it certainly is not within the spirit of the decision of this court in In re Woods, supra.

See also *Boles* v. *Kershner,* 320 F.2d 284; *State* v. *Larson,* 62 Wash.2d 64, 381 P.2d 120 (1963).

An evidentiary habeas trial was held in this case in which witnesses testified on various matters in issue. Petitioner, a man with a sixth grade education, would be hard put to manuscript the sworn testimony from memory. Petitioners with means are not required to do so. To force this petitioner to prepare an abstract of the testimony from memory violates petitioner's right to equal protection of law.

But the respondent urges that the trial court can assist the petitioner in preparing a record for appeal (R. brief 15). Even should this be deemed advisable, there is no duty enjoined upon the trial court to aid the prisoner in this manner under Iowa law. Rule 340(c) Iowa Rules of Civil Procedure provides that the judge's duty to settle the record arises only after the abstract of record and trial transcript are filed in trial court. The transcript an indigent petitioner cannot obtain; the abstract he may be unable to prepare from memory. Neither the Iowa Rules of Civil Procedure or the Iowa Supreme Court Rules impose any duty on the trial court to assist in the preparation of an indigent's appellate record in the first instance, and no case so holds. Consequently, the petitioner cannot insist on such assistance as a matter of right, even to the extent of requiring the court reporter to read back part of the trial transcript to the court for whatever aid that might provide (R. brief 16). It is relevant to point out that the petitioner

with means is not relegated to such an uncertain procedure in developing his abstract of record. He has the transcribed report of the trial laid out before him for reference.

Respondent suggests that a transcript of the habeas hearing may be unnecessary where a transcript of the criminal trial is available (R. brief 19, 23). Several factors militate against the position of the respondent here. The criminal trial transcript will not reflect procedural errors which occur in the habeas corpus trial. See *Hunsucker* v. *Balkcom,* 220 Ga. 73, 137 S.E.2d 43 (1964); *Sewell* v. *Lainson,* 244 Iowa 555, 564, 569, 57 N.W.2d 556, 561, 564 (1953); *Ex parte Holmes,* 397 S.W.2d 458 (1965).

In addition, points are frequently raised in the habeas corpus action which were not explored at the criminal trial and do not appear in that transcript. Such matters might include misconduct or incompetence of defense counsel, partiality on the part of some of the jurors who convicted the defendant, inflammatory publicity surrounding the trial which prejudiced defendant's right to fair trial, or coercion or threats which induced a plea or other action by a defendant. These and many other propositions raisable in habeas corpus may require testimony and evidence not contained in the original trial record. See e.g., *Pearce* v. *Cox,* 34 F.2d 884, 900, 901; *Sewell* v. *Lainson,* 244 Iowa 555, 568, 57 N.W.2d 556, 564; *Simpson* v. *State,* 278 Ala. 707, 179 So.2d 335 (1965). See also *Cochran* v. *Kansas,* 316 U.S. 255, 257.

In Iowa habeas corpus is triable as a law action, and upon review the question is whether there is substantial evidence to support the judgment of the trial court. *Thomas* v. *Purcell,* 252 Iowa 177, 180, 104 N.W.2d 823, 825 (1960). Such

review cannot be accomplished without a transcript and record reflecting the evidence presented in the habeas trial.

A habeas corpus hearing transcript is essential to full appeal in that such record will reflect evidence presented in the habeas corpus action on the issues involved. Examples from the instant case illustrate the point. Here an evidentiary hearing was held, and witnesses testified regarding whether or not petitioner was represented by counsel at preliminary hearing, a critical stage of state process. 1964 Op. Ia. Atty. Gen. 160. An evidentiary record is needed to review the correctness of the court's decision in adjudicating the petitioner's claim on this point.

Petitioner further alleged that his court appointed counsel did not adequately prepare his trial defense due to lack of time (R. 17, 24). Respondent suggests that the report of the original criminal trial will dispose of this issue. Case law indicates that a petitioner's evidence may properly be taken to show the extent of an attorney's investigation of a case, which matter is often not reflected in the pages of the criminal trial record. *Pearce* v. *Cox,* 354 F.2d 884, 901.

The original trial transcript will not reflect procedural errors occurring at a habeas corpus trial, nor will it show evidentiary matter developed at the habeas corpus hearing which must be reviewed to afford adequate appeal from the trial court's judgment. The original transcript might be introduced as evidentiary matter in the habeas trial, but frequently additional testimony is needed to supplement a post-conviction point only partly reflected in the trial record, and often the point raised by habeas corpus will not show in the original trial transcript at all. For these

reasons the transcript of the criminal trial is insufficient as a substitute for a habeas corpus transcript.

A further objection to the state's failure to provide petitioner with a transcript of the proceedings in habeas corpus exists. The basic rule governing appeal records in Iowa is Rule 340(a), Iowa Rules of Civil Procedure. This rule calls for the filing of a transcript with the trial court preliminary to settling the appeal record, where meaningful appeal on an evidentiary record is sought. As stated in Miller, *Appellate Procedure,* 29 Iowa L.Rev. 48, 51:

> The reporter's transcript must be filed at the same time that the typewritten proposed abstract is filed and it is impossible to prescribe a uniform rigid rule for the time within which the reporter's transcript should be filed.

See also *Schroder* v. *Claypool,* 235 Iowa 135, 140, 16 N.W. 2d 1, 3 (1944), stating that the filing of the reporter's transcript as provided by Rule 340(a) is a necessary preliminary to any settling of the appeal record. The *Schroder* case was overruled in part on another ground in *Stolar* v. *Turner,* 236 Iowa 628, 19 N.W.2d 585 (1945), but the above rule was unaffected.

In his application to the Iowa Supreme Court for a transcript, the petitioner pointed out that without a transcript he was foreclosed from pursuing all phases of his appeal (R. 39). Respondent argues that although Rule 340(a) may require the filing of a transcript, the Iowa Supreme Court has informally dispensed with other appeal rules such as the printing of records and briefs in certain unreported cases involving indigents (R. brief 16, 17). None of these cases announce a standing waiver of

the transcript filing requirement under Rule 340(a), and none assures this petitioner that he can proceed without regard to that requirement.

The respondent urges that the Iowa Court has authority to revoke or change the rule in question (R. brief 16). But nowhere in the promulgated Rules of the Supreme Court of Iowa does there appear a rule establishing waiver of the transcript requirements of Rule 340(a) for indigent prisoners. Rules of the Supreme Court of Iowa, Iowa Code (1962). Respondent's arguments do not write the transcript filing requirements of Rule 340(a) out of the law, and the waiver of other appeal rules in unreported cases does not constitute notice to the petitioner that he has a right to proceed in derogation of this requirement. Significantly, even if there were no filing requirement in Rule 340(a), petitioner is severely impaired in his efforts to prepare an adequate appeal record when no transcript is available.

**C. Where a Stenographic Transcript Is Essential to Adequate Appellate Review, It Is Unfair to Deny Such Transcript to an Indigent Petitioner.**

It is clear that the framers of the Iowa appeal provisions expected the appellant seeking effective review to be armed with a stenographic transcript of his trial. This is essential for meaningful appeal. No established substitute for a transcript has been created in Iowa appellate procedure. The controlling appeal rules specifically contemplate a transcript as a necessary basis for preparing the appeal record. As stated in the Comment by the Rules Advisory Committee discussing preparation of the appeal record, "In practice the procedure would be very simple. The

appellant and appellee would work together in preparing and designating portions of the transcript to be presented." 4 Cook, Iowa Rules of Civil Procedure, 199 (1951). See also Note, *Form of Appellate Records in Iowa,* 48 Iowa L.Rev. 77, 81 (1962).

The Iowa Supreme Court has expressed essential agreement with this proposition by ruling that the furnishing of a transcript is required to afford the indigent defendant an adequate appeal from his conviction. *Weaver* v. *Herrick,* 140 N.W.2d 178 (Iowa 1966). This is the rule in criminal causes. Why does the court apply a different rule in habeas corpus appeals?

Perhaps the reason lies in a continuing misconception regarding the habeas corpus process. Iowa has labelled this a civil proceeding, and based on this label the trial court denied petitioner a stenographic transcript (R. 36). The subject Iowa Supreme Court order cites *Waldon* v. *District Court of Lee County,* 130 N.W.2d 728, 729 (Iowa 1964), as authority for denying the request for a transcript, and in the cited case reference is made to the civil nature of habeas corpus (R. 44). This point is also developed in *Hoskins* v. *Bennett,* 256 Iowa 1370, 1376, 131 N.W.2d 510, 514 (1964), where the court articulated approval of the civil proceeding rationale as a ground for denying a transcript to an indigent in habeas corpus.

The use of the civil label should not continue to persist as a means of suppressing constitutionally protected rights, especially following the unanimous decision of this court in *Smith* v. *Bennett,* 365 U.S. 708, which dealt specifically with that point. Indeed, the respondent commendably agrees that the use of the civil label as a basis for denying a transcript to the petitioner is error (R. brief 7, 10).

Adequate appellate review is not available in Iowa without a transcript to assist the petitioner. Respondent seizes on the language of *Draper* v. *Washington*, 372 U.S. 487 which raises the possibility of a state providing the equivalent of a transcript. In the context of the appeal procedures applicable to the case at bar, no substantial equivalent has been established, and a transcript is critical under Iowa law.

The respondent would have the petitioner piece together a record under various theories, resulting in an appeal record in no way equivalent to that of the petitioner with funds. Respondent's suggestions are not consistent with equal protection of law. The petitioner, unaided by the guiding hand of counsel, has made commendable efforts throughout the case to secure his equal protection rights. At all relevant times the petitioner made appropriate application for stenographic transcript, pointing out that an evidentiary hearing was had in the case and that such transcript was necessary to prosecute an effective appeal (R. 38, 34).

If Iowa wishes to provide a report of the habeas trial equivalent to a transcript for indigent prisoners, so far it has not done so. No such equivalent or substitute is available to the petitioner under current law.

Many states have made advances in the area of protection of constitutional rights to indigent applicants for post-conviction relief. The Attorney General of Iowa invited responses from the Attorneys General of the other 49 states regarding transcript rights accorded indigents in post-conviction cases. Forty-four jurisdictions responded by letter summarizing their position, and the Iowa Attorney General has courteously provided these letters to the petitioner.

Thirty of the responding states permit appeal as a matter of right from habeas corpus or other post-conviction proceedings, and twenty-six of these thirty provide the indigent with a free hearing transcript when he appeals a denial of post-conviction relief. The establishment of the right to transcript has been variously accomplished in these jurisdictions through case law, statutes, and Supreme Court Rules. Of the responding states, approximately 75% of those providing mandatory or discretionary review of post-conviction proceedings afford a transcript at public expense to the indigent appellant.

*Lane* v. *Brown*, 372 U.S. 477, makes clear that the indigent petitioner in habeas corpus is to be given as adequate and effective appellate review as that given habeas applicants with funds. The practice in a large number of states to afford transcript rights to indigent prisoners assists greatly in meeting the challenge of providing equal justice under law. The current Iowa practice of refusing to provide such transcript as illustrated in the instant case fails to respond to this challenge, and falls below the constitutional standard.

## Conclusion

The facts of this case provide compelling documentation of the need to insure equal treatment to the poor in our courts. Imprisoned for half a year without trial, the petitioner was sentenced to a term not to exceed five years when he was convicted of stealing a pump worth $25.00. That the prisoner spent the extended period before trial in jail was attributable to his financial inability to provide bail, and this prolonged delay was termed regrettable by the Iowa Supreme Court.

At the penitentiary, petitioner's lack of funds blocked him from effective review on his habeas corpus claims, while petitioners with funds have access to full review of such claims on appeal. Equal protection of laws requires that the interests of rich and poor be weighed in equal scale. The Iowa procedure explored in this case denies transcripts and meaningful appeal to indigents while providing full review to others. Discriminating as it does by predicating effective appeal in habeas corpus on ability to pay, this procedure fails to accord the petitioner his right to equal protection of the laws.

A trial transcript is critical to meaningful appellate review. The Iowa Supreme Court did not deal in potential substitutes in deciding what tools were needed to prepare an adequate appeal record in *Weaver* v. *Herrick,* 140 N.W.2d 178 (Iowa 1966). When confronted with this problem in connection with direct appeals the court announced that a transcript was required to obtain such review. No equivalent to a transcript is provided under Iowa law, and an indigent petitioner in habeas corpus should not be required to appeal without the means of presenting his contentions to the appellate court which are as good as those available to nonindigent petitioners with similar contentions. This principle applies with particular force to the historic legal process for challenging loss of liberty and safeguarding individual rights, the writ of habeas corpus.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES

No. 77.—October Term, 1966.

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| Lawrence Long, Petitioner, *v.* The District Court of Iowa, in and for Lee County, Fort Madison, Iowa. | On Writ of Certiorari to the Supreme Court of Iowa. |

[December 5, 1966.]

Per Curiam.

Petitioner was convicted of larceny and sentenced on October 21, 1963, to a term not to exceed five years. This conviction was affirmed on appeal to the Supreme Court of Iowa (*State v. Long*, 130 N. W. 2d 663 (Iowa, 1964)), and petitioner is currently serving his sentence in the state penitentiary. On January 13, 1965, petitioner sought a writ of habeas corpus in the District Court of Iowa, Lee County, and contended, *inter alia*, that he had been denied counsel at the preliminary hearing and that he himself had been incompetent at the time. After an evidentiary hearing at which petitioner was not afforded the assistance of court-appointed counsel, the District Court found against petitioner on the facts of his claims.[1] Petitioner thereupon applied to the

[1] As to the claim of lack of counsel at preliminary hearing, the State now concedes that petitioner was not in fact represented at that time (although the District Court found to the contrary). Petitioner alleged in his petition for habeas corpus that a guilty plea obtained at the preliminary hearing was introduced as an admission at his criminal trial. The State concedes that if this is true, petitioner "probably is entitled to relief in habeas corpus under *White* v. *Maryland*, 373 U. S. 59." The Attorney General of Iowa has ruled that *White* is applicable to preliminary hearings in Iowa because guilty pleas, if made at that time, may later be used as admissions of guilt. 1964, Opinions of the Attorney General of Iowa, 160 (October 5, 1964).

District Court for appointment of counsel and for a free transcript of the habeas corpus proceedings, for use on appeal. The District Court denied these motions on the following ground: "Habeas corpus being a civil action there is no provision in the law for the furnishing of a transcript without the payment of fee, or for the appointment of counsel." Petitioner sought certiorari to this decision from the Supreme Court of Iowa. Certiorari was denied without opinion [2] by that court.[3] On petition for a writ of certiorari to the Supreme Court of Iowa, this Court granted the writ limited solely to the refusal to furnish petitioner, an indigent, with a transcript of the habeas corpus proceeding, for purpose of appeal.

The judgment below must be reversed. The State properly concedes that under our decisions in *Smith* v. *Bennett*, 365 U. S. 708 (1961), and *Lane* v. *Brown*, 372 U. S. 477 (1963), "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." *Smith* v. *Bennett*, *supra*, at 709. We specifically held in *Smith* that having established a post-conviction procedure, a State cannot condition its availability to an indigent upon any financial consideration. And we held in *Lane* that the same rule applies to protect an indigent against a financial obstacle to the exercise of a state-created

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[2] The court's order reads: "Petition for certiorari filed, considered, and denied. See in this connection, *Waldon* v. *District Court of Lee County, Iowa*, 130 N. W. 2d 728." The *Waldon* case held only that a State need not provide appointed counsel on appeal from the denial of habeas corpus; it does not so much as refer to the transcript problem, to which this Court limited the grant of certiorari in this case.

[3] Petitioner's notice of appeal to the Supreme Court of Iowa was timely and properly filed. His appeal is pending before that court, and disposition has been stayed until the outcome of this preliminary case.

right to appeal from an adverse decision in a post-conviction proceeding.

In *Lane* v. *Brown, supra,* the Court reaffirmed the fundamental principle of *Griffin* v. *Illinois,* 351 U. S. 12 (1956), that "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U. S., at 19; 372 U. S., at 483. The Court in *Lane* went on to observe that *Smith* had established "that these principles were not to be limited to direct appeals from criminal convictions, but extended alike to state postconviction proceedings." 372 U. S., at 484. See also *Eskridge* v. *Washington State Board,* 357 U. S. 214 (1958); *Burns* v. *Ohio,* 360 U. S. 252 (1959); *Draper* v. *Washington,* 372 U. S. 487 (1963).

The State suggests that there may be alternative ways of preparing, for purposes of appeal, an account of the relevant proceeding at the trial level. Cf. *Draper* v. *Washington, supra.* In the present case, a transcript is available and could easily have been furnished. We need not consider a possible situation where a transcript cannot reasonably be made available and adequate alternatives are made available by the State. Accordingly, the judgment below must be reversed and the cause remanded to the Supreme Court of Iowa for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*